APPENDIX F

FILED
DEC 6 1996

NOT TO BE PUBLISHED

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE**

THE PEOPLE, Plaintiff and Respondent, v. LEIF EUGENE TAYLOR, Defendant and Appellant.	B091340 (Super. Ct. No. NA 018040)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Sheldon, Judge. Affirmed.

Robert Franklin Howell, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, Robert Carl Schneider and Frederick Grab, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant Leif Taylor[1] guilty of first degree felony murder and second degree robbery, both with personal use of a firearm. (Pen. Code, §§ 187, subd. (a), 189, 211, 212.5, 12022.5, subd. (a).)[2] The jury having found the robbery special circumstance allegation to be true (§ 190.2, subd. (a)(17)), defendant received a sentence of life without the possibility of parole (§ 190.5, subd. (b)). We affirm the judgment.

BACKGROUND

On the night of May 31, 1993, William Shadden was riding his bicycle home from his job as a gondola rower in Belmont Shore in Long Beach. Shadden was ambushed near the corner of Ocean and La Verne by defendant, then 16, and another youth who forced him off his bicycle in a strong-arm robbery.[3] Shadden, who did not know defendant was carrying a concealed handgun, gave chase. Defendant ran off, with Shadden in pursuit. While running, defendant pulled the gun out with his right hand and aimed it under his left arm, firing twice. Shadden died as a result of his injuries.

Identity was the main issue at trial. Two eyewitnesses testified, but neither could positively identify defendant. The prosecution, however, played defendant's taped confession for the jury after the court denied defendant's exclusionary motion. (Evid. Code, § 402.) In addition, the prosecution introduced defendant's oral admission ("'I think I killed the fool'") through a pretrial statement made to police by a female companion, Ana Bonilla, who was with defendant shortly after the shooting.

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[1] Defendant's first name is spelled both Lief and Leif in the record. The transcript of defendant's testimony at the Evidence Code section 402 hearing shows, however, that defendant goes by Leif, which is the version adopted in this opinion.

[2] Unless otherwise indicated, all further statutory references are to the Penal Code.

[3] The record does not indicate whether the other youth, identified as Victor Rodriguez, was caught or tried.

FACTS

According to eyewitness Debra Gray, who lived in a second story apartment at the location, two gunshots were fired around 11:20 p.m. Gray looked out her front door in time to see "a young male Hispanic, attempting to pick up a bike." She heard him say either, "we . . . shot or got the fucker." She also saw the other eyewitness, Gerald Ofhgang, emerge from his pickup truck and head toward the bicycle as the two assailants ran off. Ofhgang found Shadden lying in a bed of iceplant and yelled to Gray. Gray called 911 and ran down to help.

According to Ofhgang, he saw "two men, each with their hands on opposite handlebars of the bicycle, attempting . . . to shake [Shadden] off the bicycle." Ofhgang described the assailants as "[b]oth [having a] slim build, one approximately five five, five six, the other closer to about five eight, five nine, short-cropped hair, white bagg[y] t-shirts, dark, possibly black bagg[y] pants, and I believe both wearing sneakers or tennis shoes." He thought "they both appeared to be light-skinned Hispanics [with] the shorter man being 14 to 15, the taller being 16 to 17." Ofhgang was certain the shorter man was not defendant, but was unable to identify defendant as the taller man.

Ohfgang testified he had seen Shadden chasing the taller man down a sidewalk as the shorter man ran down the middle of the street. Ofhgang lost sight of Shadden and the taller assailant, but saw the shorter man come back for the bicycle. Ofhgang moved his truck closer to the bicycle to scare the shorter man away. When the shorter man noticed Ofhgang's approaching truck, he dropped the bicycle and ran away. Ofhgang got out of the truck and put the bicycle on the sidewalk. He also picked up Shadden's backpack before discovering Shadden lying in the iceplant.

The coroner testified Shadden died of two gunshot wounds, one to the chest and the other to the left shoulder. From the absence of sooting or tattooing around the wounds, the coroner concluded the gun had been fired from more than two feet

away.

Ana Bonilla, age 17, had heard about a reward for information concerning the crime and was interviewed by Long Beach Police Department homicide detective Craig Remine. She knew both defendant and Victor Rodriguez (also known as Chris or Cress). She testified to being in a van with six or more people on the night of and in the vicinity of the shooting. She testified she had seen defendant and Rodriguez enter the van near the intersection of La Verne and Ocean and heard someone say something about someone having been killed, but was unsure who said it. She testified she also heard someone say, "'pee on my hand[,]'" but did not see anyone do so.

Remine testified, however, to two significant discrepancies between Bonilla's testimony and her pretrial statement. According to Remine, Bonilla had said she heard defendant say, "'I think I killed the fool[.]'" In addition, Bonilla had said "[t]hat, after the defendant and Victor Rodriguez entered the van, north of the crime scene, that she turned around in the van, to face the rear of the van, and she observed, I forgot which one of the individuals in the van, but one of them was urinating on the defendants hands." Remine explained the urine would have made a gunshot residue test worthless had the van been stopped by the police that night.

Remine also gave the following account at trial of defendant's arrest and interrogation. Remine went to defendant's home at 11:30 p.m. on September 1, 1993, to serve arrest and search warrants. Defendant was asleep on the couch when the officers entered. After defendant got dressed, he was taken to the station and questioned. The interrogation began at 12:20 a.m. and ended at 3:13 a.m.

For in excess of two and a-half hours, defendant, who had signed a written waiver, denied any personal involvement in the crime. The first two and a-half hours of the interview were not taped and Remine subsequently destroyed his notes. When defendant finally admitted his involvement in the crime by implicating himself as the shooter, the officers asked to tape his statement and he agreed. The taped portion of the interview

began at 3:02 a.m. and ended at 3:13 a.m. According to Remine, defendant expressed no emotion during the interrogation and did not cry, but appeared a little tired.

The jury heard the taped confession (the Evidence Code section 402 hearing will be discussed later in this opinion) in which defendant confessed as follows: Defendant admitted he had signed a written waiver before discussing the crime with the officers. On the night in question, he went with some others, including "Ann" (Bonilla), in a van to Belmont Shore to "get some bicycles[.]" Defendant stayed in the van while "Skill and Cress got out and clipped the chain and took [a] bike" off a motorhome. (According to Remine's testimony, Cress is Victor Rodriguez and Skill is Eddie Gonzales.) Skill and Cress got back in the van with the stolen bike. As the van proceeded along Ocean, they saw Shadden riding his bicycle in the opposite direction. The van turned around and defendant and Cress got out and grabbed Shadden's bike from both sides. Shadden "got off, and he didn't say nothing. And then Cress said, 'Get the bike,' and then he went -- he went towards the bike to get it. And then [Shadden] looked at Cress and said, 'I'm going to kill you' and then started chasing Cress" on La Verne. After a few steps, Shadden turned around and started chasing defendant. Defendant stated: "And then I looked back, and he started to grab me, and then I realized that I had the gun in my pocket. [¶] Without thinking, I pulled it out and just shot underneath my arm just twice to scare him, but I ended up hitting him. But I didn't know that." Defendant ran and got back in the van.

On cross-examination of Remine, the defense brought out the circumstances surrounding the interrogation. Defendant was taken, without his parents, and placed in a small interview room about 6 by 12 feet. At 16, defendant was considerably younger and physically smaller than either Remine or Remine's partner, MacLyman, who were both in the interview room for the next three hours. Defendant was given no food, offered no rest break, and may or may not have been given any water.

The defense presented the expert testimony of Marcia Mills,

a clinical psychologist who specializes in forensic psychology. She testified she had administered an intelligence test to defendant and he had tested as low average on the verbal scale, and as middle average on the performance scale, with an "I.Q. of 90." She further testified that defendant's school achievement scores from 7th to 9th grades had steadily declined, with his October 1992 reading score placing him in the bottom five percent of 9th graders. On cross-examination, however, Mills admitted that defendant's low test scores did not eliminate his capacity to admit his crime, assuming he had committed one. Mills also conceded defendant had the mental capacity to understand the standard *Miranda*[4] warning given by the police.

In addition to Mills' testimony, defendant sought to introduce the testimony of attorney Arthur Close. Close would have testified to a telephone conversation he had with defendant immediately following the interrogation and confession. (At the Evidence Code section 402 hearing, Close testified that during the phone call, defendant "was in tears and highly agitated.") Defense counsel made an offer of proof that, "As I understood Art Close's testimony[, it] was that he received a call from [defendant] about four a.m. and that [defendant], at that time, said that he had given a false confession to a cop in order to make a phone call to Mr. Close in his capacity as a lawyer. I am offering it under [section] 1250 of the Evidence Code as a statement of the defendant's state of mind earlier when he made that statement." The trial court, who had heard Close testify at the Evidence Code section 402 hearing, excluded Close's testimony at trial.

ISSUES

Defendant contends: (I) his confession should have been suppressed; (II) Close's testimony should have been admitted at trial; (III) it was error not to instruct the jury to view his confession with caution; (IV) the jury should have been

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[4] *Miranda* v. *Arizona* (1966) 384 U.S. 436.

instructed on premeditated murder, second degree murder, and voluntary manslaughter; (V) he should not have been convicted of felony murder based on the charged offense of malice murder; (VI) his sentence constitutes cruel and unusual punishment.

DISCUSSION

I

Defendant contends his waiver and confession were involuntary as a matter of law and that the admission of his confession violated the Fifth and Fourteenth Amendments as well as *Miranda* v. *Arizona* (1966) 384 U.S. 436. We conclude otherwise.

The trial court must determine, at a hearing conducted outside the jury's presence, whether the waiver and confession were voluntary and the *Miranda* requirements were met. The prosecution bears the burden of proving this by a preponderance of the evidence. (*People* v. *Markham* (1989) 49 Cal.3d 63, 67, fn. 3.) On appeal, the trial court's determination will be upheld if supported by a substantial evidence. (*People* v. *Salinas* (1982) 131 Cal.App.3d 925, 933.) "We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained. [Citation.]" (*People* v. *Boyer* (1989) 48 Cal.3d 247, 263, disapproved on other grounds in *People* v. *Stansburg* (1995) 9 Cal. 4th 824, 830, fn. 1.)

In this case, defendant testified at the Evidence Code section 402 hearing that his repeated requests to call a lawyer and have his mother present during the interrogation had been denied. He claimed to have falsely confessed because it was the only way he could make a phone call. He testified that Officer MacLyman, who did not testify at the exclusionary hearing or

at trial, had repeatedly shoved diamond ring with the number "187" in his face, and drawn long and short lines to represent the prison sentences he would get depending upon whether he cooperated or not. Defendant also denied being in the van on the night in question or in the vicinity of Belmont Shore. He claimed to have just repeated the facts of the crime as told to him by the officers because he was tired, scared, and wanted to get out of the interrogation room. He explained that his taped acknowledgment of his written waiver was a lie, and that he simply had been given a piece of paper and told to sign it without being allowed to read it.

Officer Remine, on the other hand, testified to facts which, if believed, showed the waiver was knowingly and intelligently given and the confession was voluntary. Remine stated defendant had been advised of his rights, which he waived both orally and in writing. Remine did not recall whether defendant had asked to call an attorney, displayed any emotion, or cried during the untaped portion of the interview. He also did not recall MacLyman pointing the "187 ring" at defendant or drawing long and short lines on a piece of paper. He denied telling defendant it would go easier on him if he confessed and that he could not make any phone calls until he told the officers what they wanted to know.

Defendant's contrary testimony is not grounds for reversal. The trial court explicitly found Officer Remine, and not defendant, to be the credible witness, stating: "I am a fact finder first, and I have to decide and say who I believe. I conclude, in this case, that I clearly believe, beyond a reasonable doubt, Officer R[e]mine and not the testimony of the defendant in this case. . . ." The evidence found credible by the trial court supports the determination that the waiver and confession were voluntary. (Evid. Code, § 411; *People* v. *Thornton* (1974) 11 Cal.3d 738, 754, disapproved on other grounds in *People* v. *Flannel* (1979) 25 Cal.3d 668, 684, fn. 12; 3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, §§ 1750-1756, pp. 1704-1711.)

II

We conclude the trial court properly excluded Close's testimony at trial as inadmissible under the hearsay rule.

Defense counsel sought to introduce Close's testimony as circumstantial evidence of defendant's prior state of mind during the interrogation: "I am offering it under 1250 of the Evidence Code as a statement of the defendant's state of mind earlier when he made that statement. [¶] What I want the court to understand is -- what I am offering is that he told him he had made a false confession in order to call his lawyer, and that's an explanation of why it is he made that confession. And since 1250 allowed his state of mind, exception that allows a statement of intent or purpose, which I think that's what [defendant's] testimony in, pardon me, his statement to Mr. close was and because it goes to a pre-existing state of mind, I think that it is admissible, and I would make that offer."

Evidence Code section 1250, however, applies to the declarant's present mental state, as opposed to the declarant's mental state at a time prior to the statement. The statute provides: "(a) Subject to section 1252,[5] evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant. [¶] (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

By its terms, Evidence Code section 1250 is inapplicable to this case. Defendant telephoned Close after the interrogation

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[5] "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness." (Evid. Code, § 1252.)

was finished. His state of mind after the interrogation is not an issue in this case, nor does the evidence suggest there was a continuing mental state which carried over from the taped confession through the subsequent telephone call. On the contrary, we presume the taped confession was devoid of any obvious display of emotion, given defendant's failure to bring any such display to our attention in his appellate briefs or to the jury's attention below.

Given that Evidence Code section 1250 does not apply, the admissibility of Close's testimony depends upon whether it qualifies under the prior state of mind exception of Evidence Code section 1251. That provision states: "Subject to section 1252, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if: [¶] (a) The declarant is unavailable as a witness; and [¶] (b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation."

The prior state of mind exception does not apply because defendant was not unavailable as a witness. The fact that he exercised his privilege against self-incrimination at the trial does not make him unavailable. "A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying." (Evid. Code, § 240, subd. (b).) "Thus, 'a party may not arrange a declarant's disappearance in order to use the declarant's out-of-court statement'; and if the statement is that of the party himself, he may not create 'unavailability' by invoking a privilege. [Citation.]" (1 Witkin, Cal. Evidence (3d ed. 1986) The Hearsay Rule, § 562, p. 537.)

Defendant contends the trial court improperly excluded Close's testimony as irrelevant and cites *Crane* v. *Kentucky*

(1986) 476 U.S. 683 in support of its admission. In *Crane*, the 16-year-old defendant had tried to introduce the testimony of police officers describing the length of the interrogation and the manner in which it was conducted. The trial court excluded the officers' testimony on the ground that the voluntariness of the defendant's confession had been resolved against him at the pretrial hearing, and the Kentucky Supreme Court affirmed. The United States Supreme Court reversed, holding the excluded evidence was relevant to the jury's determination on the credibility of the confession, an issue distinct from the voluntariness of the confession. "[E]vidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess." (*Id.* at p. 688.)

Crane is distinguishable. In this case, defense counsel extensively cross-examined Remine concerning the manner in which the confession was secured. Factors including the size of the room, the length of the interrogation, the lack of food and rest, the late hour, the defendant's age and smaller size, and the absence of his parents and attorney were all brought out for the jury's evaluation. The exclusion of Close's testimony regarding a post-interrogation telephone conversation is not the equivalent of the exclusion of the officers' testimony in *Crane* regarding the manner in which the confession was obtained.

Defendant also contends Close's testimony was improperly excluded in violation of his right to due process under the Fourteenth Amendment. He maintains he was unfairly deprived of the constitutional right to present exculpatory evidence and that the state hearsay rule should give way to the federal constitution. For the reasons stated above, this was not an instance where a state rule of evidence unfairly abridged a defendant's constitutional right to due process. Close's excluded testimony regarding the post-interrogation conversation was not the sole evidence of what went on in the interrogation room. Remine's cross-examination testimony regarding the manner in which the interrogation was conducted and the taped confession itself provided the jury with the

evidence which defendant erroneously contends was missing at trial. Defendant's post-interrogation conversation with Close in which he described his prior state of mind was self-serving and "made under circumstances such as to indicate its lack of trustworthiness." (Evid. Code, § 1252.)

We conclude the evidence was properly excluded as hearsay, the exceptions under Evidence Code section 1251 and 1252 do not apply, and defendant's constitutional rights were not violated.

III

Defendant contends it was error not to instruct the jury to view his confession with caution. We conclude otherwise.

The trial court considered and rejected the cautionary instruction after noting that during the unrecorded first two and a-half hours of the three-hour interrogation, defendant did not admit his guilt. When defendant finally confessed at the end of the two and half-hour period, his confession was recorded on an 11-minute tape and the interview was concluded.

Because the confession was taped, the trial court concluded the cautionary instruction was unnecessary and would be potentially confusing if given. The court stated in relevant part: "[T]hat cautionary instruction . . . shouldn't be given, perhaps because it would create a confusing situation for the jury. Why is it you look at it with caution, when there is an actual taped version of the statement, including an uncontested taped version. [¶] From the way I see the evidence in this case, and that statement given on tape was not different than anything testified to preliminarily, other than the fact that the other statements given first were denials, which weren't admissions or confessions. [¶] Finally, the defendant, according to the evidence, did confess, or [made] a number of admissions, which really totaled up to a confession. [¶] So, I think it would create confusion, rather than be helpful, even though the defense would like to have the statement, look at it with caution, and I don't think I should give an instruction if it is not applicable.

I don't believe it is applicable in this case. Most cases it would be. I don't think it is in this case. So I don't intend to give it."

The trial court was right. Because the untaped portion of the first two and a-half hours of the interview contained only denials (until defendant finally confessed at the end of that period and the recorder was turned on), there were no admissions made during the untaped interview which the jury should have been advised to view with caution. As for the incriminating portion of the interview, the jury had an uncontested recording of the confession so there was no need to warn the jury to view its accuracy with caution. (*People v. Hines* (1964) 61 Cal.2d 164, 173, overruled on other grounds by *People v. Murtishaw* (1981) 29 Cal.3d 733, 774-75, fn. 40.)

IV

Defendant was charged with premeditated malice murder, but the jury was instructed only on felony murder. Defendant contends the jury should have been instructed on premeditated malice murder and its lesser included offenses of second degree murder and voluntary manslaughter. He maintains the failure to give those instructions exposed him to the possibility that the jury disbelieved his confession but nonetheless convicted him of first degree murder because it had no lesser options.

Defendant's theory rests on the fact that the information alleged only premeditated murder with malice aforethought, a violation of section 187, subdivision (a), and failed to allege that the murder occurred in the commission or attempted commission of a robbery or other felony as enumerated in section 189. Accordingly, defendant contends, given that felony murder under section 189 was not charged, he should not have been convicted on that theory and the failure to instruct on premeditated malice murder and its lesser included offenses was prejudicial error.

The information, however, alleged both the premeditated malice murder of William Shadden on May 31, 1993, and the second degree robbery of the same victim on the same date,

both with personal use of a firearm. In addition, the murder count expressly alleged that the murder was committed while the defendant was "engaged in the commission of the crime of Robbery, within the meaning of . . . section 190.2[subd.](a)(17)." Although the information did not mention section 189, the allegations were nevertheless sufficient to put defendant on notice that he was being charged with a murder that occurred during the commission of a robbery, or felony murder. Moreover, a defendant charged with malice murder may be convicted upon a theory of felony murder. It is not necessary that an information charging murder with malice must also expressly charge a felony murder under section 189. (*People v. Scott* (1991) 229 Cal.App.3d 707, 712-718.) There was no due process violation.

V

In a related contention, defendant asserts his felony murder conviction must be reversed because he was charged only with the separate crime of malice murder. He claims the conviction of the uncharged offense of felony murder deprived him of due process of law.

Citing *People v. Dillon* (1983) 34 Cal.3d 441, 465, defendant maintains that felony murder is a separate crime, distinct from malice murder, and not simply a devise by which the existence of malice is presumed from the commission of the underlying felony. He states: "Since appellant was charged only with malice murder -- specifically alleged under section 187 -- he was convicted of an offense not charged against him. Appellant was thereby deprived of due process . . . ."

We reject this assertion for the same reasons stated in part IV above and in *People v. Scott, supra*, 229 Cal.App.3d at pages 714-718. "Neither [section] 951 nor 952, specifying the form and matters that must appear in an information, contains a requirement that the statute which the accused is charged with violating be designated by number." (4 Witkin & Epstein, Cal. Crim. Procedure (2d ed. 1989) Proceedings Before Trial, §

2065, p. 2433.) Under section 952, it would have been sufficient to allege that defendant has murdered Shadden, without specifying the degree.[6] (*People v. Diaz* (1992) 3 Cal.4th 495, 556-557.)

VI

Citing *People v. Dillon, supra*, 34 Cal.3d 441, defendant contends his sentence constitutes cruel and unusual punishment.[7] Defendant points out he was only 16 years old at the time of the offense, had no prior convictions (but he had three verified prior arrests for trespassing, curfew violation, and graffiti writing, and a fourth disputed arrest for assault with a firearm), and had a limited intellectual capacity. He claims his family situation was bleak (he says he lived in a one bedroom apartment with an alcoholic and depressed welfare mother in a dangerous neighborhood, he never knew his father, he suffered

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[6] Section 952 provides: "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft, it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

[7] "The basic test of a cruel or unusual punishment under *Dillon* is whether it is so disproportionate to the crime as to shock the conscience and offend fundamental notions of human dignity. [Citation.] The main technique of analysis under *Dillon* is to examine the nature of the offense and the nature of the offender. [Citation.] (1) With respect to the nature of the offense, te court considers not only the offense in the abstract, but also the facts of the crime in the particular case, 'including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts.' [Citation.] (2) With respect to the nature of the particular person before the court, the question is whether the punishment is 'grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior ciminality, personal characteristics, and state of mind.' [Citation.]" (*People v. Mora* (1995) 39 Cal.App.4th 607, 614.)

from asthma), and his crime was "impulsive, amateurish, and ineffectual."

While it is true that defendant was only 16 and had no prior convictions, we strongly disagree with defendant's mild characterization of his crime. This was far more serious, sophisticated, and callous crime than the one in *Dillon*, which we distinguish. In *Dillon*, "an unusually immature 17-year-old with no prior criminal record became involved in a plan to steal growing marijuana from a field, and in a panic shot and killed a person who was guarding the field. He was guilty of first degree felony murder, but the trial court was reluctant to impose the statutory punishment of life imprisonment, which it considered extraordinarily harsh under the circumstances. The Supreme Court held that the statutory punishment violated the cruel or unusual punishment clause of the California Constitution in the particular circumstances, and that the offense could be reduced to second degree murder in order to prevent unconstitutional punishment." (*People v. Mora, supra*, 39 Cal.App.4th at pp. 613-614.)

This crime, on the other hand, involved a planned, physical confrontation with Shadden over a bicycle. It involved far greater risk of physical injury than would be inherent in stealing marijuana plants from a supposedly unoccupied field. Here, defendant was riding around in a van looking for bicycles to steal. When he spotted Shadden riding down the street, he got out of the van with the intention of ambushing him, forcing him off his bicycle, and robbing him. Defendant also carried a concealed handgun, which he pulled out and suddenly fired without warning when Shadden chased him. There was a much greater potential for violence in this case than in *Dillon*. We conclude that "the first *Dillon* factor, the nature of the offense including the way it was committed and the extent of defendant's involvement, does not compel reducing the statutory punishment as cruel or unusual." (*People v. Mora, supra*, 39 Cal.App.4th at p. 618.)

Defendant also contends the trial court abused its discretion by failing to impose the indeterminate term of 25 years to life,

which is the alternative sentencing choice provided in section 190.5, subdivision (b). That statute expressly states that the sentence to be imposed on a juvenile who was between 16 and 18 years of age at the time of the first degree murder with special circumstances shall be life without parole "or, at the discretion of the court, 25 years to life." (§190.5, subd. (b).) The record reflects that the trial court was fully aware of its sentencing choices and deliberately exercised its discretion after taking the matter under submission.

The trial court possesses broad discretion, limited by the bounds of reason. "By such expression is implied absence of arbitrary determination, capricious disposition, or whimsical thinking. An exhibition of ungoverned will, or a manifestation of unbridled power is not the use of discretion. The word imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just." (*Gossman v. Gossman* (1942) 52 Cal.App.2d 184, 195.)

Where, as here, a statute vests the trial judge with the discretionary power to decide the issue, "the appellate court will not substitute its own view as to the proper decision. '[T]he showing on appeal is wholly insufficient if it presents a state of facts, a consideration of which, for the purpose of judicial action, merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge. To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice.' [Citations.]" (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 275, p. 286, quoting *Brown v. Newby* (1940) 39 Cal.App.2d 615, 618.)

In this case, the record contained several mitigating factors, argued by defense counsel below, including defendant's young age at the time of the crime and his lack of prior convictions. The record also contained, however, numerous aggravating factors. This crime was a senseless, random act of violence against a victim who happened to be riding his bicycle along the very street where defendant and his cohorts were trying to steal bicycles. Although defendant and his companions knew they could readily steal unattended bicycles, having only moments earlier successfully done so, they nevertheless decided to ambush Shadden and commit a strong-arm robbery. This criminal enterprise necessarily involved a high risk of physical injury and, given that defendant was armed with a concealed weapon, even death. Without warning Shadden that he was armed, defendant suddenly pulled out the concealed weapon and fired it under his arm while on the run, giving Shadden no chance to back off. The attack by ambush, the carrying of a concealed weapon, the random selection of the victim, and the senseless killing over a bicycle all demonstrated the extremely callous, brutal, and vicious nature of this crime. The trial court's selection of the harsher sentence was not an abuse of discretion.

DISPOSITION

We affirm the judgment.

NOT TO BE PUBLISHED.

ORTEGA, Acting P.J.

We concur:

VOGEL (Miriam A.), J.

MASTERSON, J.